In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,
Petitioner,
vs.
HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, et al.,
Respondents.

BRIEF FOR PETITIONER.

EDMUND G. BROWN,
Attorney General of the State of California,
HERBERT E. WENIG,
Assistant Attorney General of the State of California,
RICHARD S. L. RODDIS,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
EDWARD M. WHITE,
160 No. LaSalle Street, Chicago, Illinois,
Counsel for Petitioner.

Index

Pages

Constitutions and Statutes

UNITED STATES STATUTES

CALIFORNIA STATUTES

NEW YORK STATUTE

Miscellaneous

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA, *Petitioner,*

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, et al., *Respondents.*

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 84-97) is reported in 233 F. 2d 251. The memorandum opinion of the District Court (R. 57-66, 71-72) is reported in 132 F. Supp. 536. The supplemental memorandum of the District Court is unreported (R. 71-72).

JURISDICTION.

The judgment of the Court of Appeals was entered April 23, 1956 (R. 97). A timely petition for rehearing was filed May 23, 1956, and was denied June 7, 1956 (R. 98). Petition was filed September 5, 1956, and was granted December 10, 1956 (R. 98). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The State of California owns and operates the State Belt Railroad as part of the facilities of the Harbor of San Francisco, which railroad is engaged in interstate commerce. The Board of Harbor Commissioners for San Francisco Harbor negotiated a collective agreement with representatives of the State Belt employees. Certain employees have filed claims against the State of California with National Railroad Adjustment Board under section 3 of the Railway Labor Act (sec. 3(i), 48 Stat. 1189, 45 U.S.C. § 153(i)). The judgment of the court below would order the Board to hear and make awards on these claims:

1. Whether the Railway Labor Act applies to a state in the operation of an interstate railroad carrier.

2. Whether the National Railroad Adjustment Board has jurisdiction over claims based on a collective agreement which is in conflict with and violates the civil service laws of the State of California.

STATUTES INVOLVED.

The statutory provisions involved are the Railway Labor Act (44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U.S.C.A. §§ 151-163 (1954), the pertinent portions of which are printed in appendix C*); section 1(1)-(3) of the Interstate Commerce Act (24 Stat. 379 (1887), as amended, 49 U.S.C.A. § 1(1)-(3) (1955 Supp.), app. D); Amendment XI, United States Constitution; Article XXIV, California Constitution, Article XXIV (app. E); State Civil Service Act, California Government Code

*Appendix is that attached to Petition for Certiorari.

sections 18500 *et seq.* (app. E); California Harbors and Navigation Co., sections 1700, 1732, 1732.7, 1990, 3084, 3150 (app. F).

STATEMENT.

The judgment of the Court below would compel the First Division of the National Railroad Adjustment Board to take jurisdiction and decide claims of the five respondent-employees, filed with the Board against their employer, the State of California, under the provisions of section 3 of the Railway Labor Act[1] (sec. 3(i), 48 Stat. 1189, 45 U.S.C. sec. 153(i)). These state employees are engaged as engineers and trainmen in the operation of the State Belt Railroad which is owned and operated by California as part of the facilities of San Francisco Harbor. The "State Belt" is a terminal switching railroad about five miles in length and located entirely within the corporate limits of the City and County of San Francisco (*Sherman v. U. S.*, 282 U. S. 25, 29). It is regarded as a common carrier, engaged in interstate commerce (*United States v. California*, 297 U. S. 175). Its lines parallel the water front of San Francisco and serve some forty-five wharves and one hundred and seventy-five industrial plants. It has track or freight car ferry connections with three interstate railroads. The number of its employees varies between 125 and 225 persons (*State v. Brotherhood of RR Trainmen, et al.*, 37 Cal. 2d 412, 414, 232 P. 2d 857).[2]

---

[1] 44 Stat. 577, 48 Stat. 926, 48 Stat. 1185, 49 Stat. 1021, 54 Stat. 785, 62 Stat. 909, 62 Stat. 991, 63 Stat. 107, 63 Stat. 880, 63 Stat. 972, 64 Stat. 1238.

[2] Hereafter referred to as *State v. Brotherhoods* (R. 85, footnote 4).

Approximately 425 other State employees are employed on the non-railroad work of the harbor (R. 54). The Board of State Harbor Commissioners for San Francisco Harbor[3] is authorized to operate and maintain the State Belt on "any State lands, or the water front or lands within its jurisdiction" (Calif. Harbors & Navigation Code sec. 3150, app. 83).[4] Members of the Harbor Board are appointed by the Governor, subject to the consent of the State Senate (Calif. Harbors & Navigation Code sec. 1700, app. 81).

Under California's Constitution, all State Belt employees are members of the State Civil Service System (Calif. Const., Art. XXIV, app. 74). The constitutional provision states that "Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination" (sec. 1). The "State Civil Service Act," pursuant to the State Constitution, provides a comprehensive personnel system, based upon merit, efficiency and fitness, as ascertained by competitive examinations and for the employment, classification, promotion, salary ranges, and general working conditions for all members of civil service (Calif. Gov. Code sec. 18500, app. 76).[5] These provisions are implemented by regulations of the State Personnel Board. Grievances involving status, seniority, lay-offs, rates of

[3]Hereinafter referred to as the "Harbor Board".

[4]Appendix is that attached to petition for writ of certiorari.

[5]The State Civil Service Act sets forth its purpose as:

"(a) To facilitate the operation of Article XXIV of the Constitution.

(b) To promote and increase economy and efficiency in the State service.

(c) To provide a comprehensive personnel system for the

pay, hours of work, and classification, are heard and determined by the State Personnel Board with the right of review in the California courts (Calif. Gov. Code secs. 18714, 18803, 18851, 19541).

Employees in respondent's classifications are paid upon an hourly basis. Their rates of pay are fixed by the State Personnel Board, based upon the prevailing rate in the community (Calif. Gov. Code sec. 18853). After a year of service and meeting certain standards, they are paid one salary "step" above the prevailing rate (Calif. Gov. Code sec. 18854, app. 79).

The port manager, selected by the Harbor Board, appoints, "subject to the State Civil Service Act," employees of the Harbor (H. & N. Code sec. 1732.7, app. 81-82). The five respondent employees, two engimemen and three trainmen, took and passed qualifying civil service examinations and were appointed by the port manager of the Harbor Board from eligible lists established by the State Personnel Board (R. 27, 54).

State civil service, wherein:

(1) Positions involving comparable duties and responsibilities are similarly classified and compensated.

(2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.

(3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service whenever practicable.

(4) The rights and interests of the State civil service employee are given consideration insofar as consistent with the best interests of the State.

(5) A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of the employees.

(6) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds." (Calif. Gov. Code sec. 18500.)

On September 1, 1942, the Brotherhood of Railway Trainmen, representing the yard engine foreman and helpers, and the Brotherhood of Locomotive Firemen and Enginemen, representing the locomotive engineers, firemen and hostlers, asserted that California was subject to the Railway Labor Act and that the Harbor Board was required to collectively bargain with respect to working conditions and rates of pay for State Belt employees, in the classifications represented by them. Thereupon, the members of the Board entered into a collective bargaining agreement with the Brotherhoods. The contract provided for working conditions covering status, seniority, hours of work, and rates of pay (R. 100-116). A number of these provisions are in conflict with those of the State Civil Service Act and the regulations of the State Personnel Board (*State v. Brotherhoods*, 37 Cal. 2d 412, 414, 232 P. 2d 857, 859, app. 84-85). The contract has never been changed (R. 55).

At various times between 1949 and 1951, the Brotherhoods, on behalf of the five respondent state employees in the present action, filed claims with the National Railroad Adjustment Board. The disputes concerned proper classification, extra pay, and seniority rights (R. 7-9).

All of the claims, with the possible exception of respondent Taylor's claim for classification as an engineer with seniority (R. 72), if allowed, would result in monetary awards against California, in favor of the individual respondents.[6]

---

[6]These claims or dockets before the Adjustment Board are part of the unprinted record (R. 99) and may be summarized as follows:

A subsequent Harbor Board, through the California Attorney General, in January, 1948, brought a declaratory judgment action in the California courts against the two Brotherhoods, as representative signatories to the contract to determine:

> 1. Do the provisions of the Railway Labor Act require the State of California to enter into collective bargaining with its employees engaged upon the State Belt Railroad?

—*Taylor*, Docket 24,211, filed April 5, 1949, by Brotherhood of Locomotive Firemen and Enginemen.
For classification as a permanent civil service engineer with certain seniority rights (R. 7, 33). Harbor Board asserts that Taylor did not have such a status, and that under civil service the State Personnel Board must decide the matter. Taylor contends he achieved the position and attendant seniority rights under the contract.

—*Brewster*, Docket 25,034, filed September 28, 1949, by Brotherhood of Railroad Trainmen.
Seeks reinstatement from civil service classification as a "war duration" switchman to permanent civil service position of switchman, and for full-time pay from date of removal from service on July 1, 1947 (R. 8, 33). Brotherhood alleges Brewster acquired permanent position under the contract. With respect to the issues here, California alleges the Adjustment Board lacks jurisdiction because the contract is invalid, in that Harbor Board had no authority to make a contract providing for conditions in conflict with State civil service.

—*Calus*, Docket 25,597, filed January 31, 1950, by Brotherhood of Locofnotive Firemen and Enginemen.
Claims pay for one day, or eight hours of pilot service (R. 7, 34). Brotherhood asserts Calus performed two types of service on the day in question—switchman and pilot service, and should be paid for both under collective bargaining agreement. California moved for dismissal of claim, on ground Adjustment Board lacks jurisdiction, in that California, as the operator of the State Belt Railroad, is not subject to the Railway Labor Act.

—*Greer*, Docket 25,655, filed February 8, 1950, by Brotherhood of Locomotive Enginemen and Firemen.
Claim for pay for eight hours for services rendered as engine crew helper and engineman, pursuant to the terms of the

2. If the provisions do apply to the State of California, is the Railway Labor Act constitutional?

3. Is the collective bargaining contract valid?

4. Do the provisions of the contract which contravene the civil service laws and regulations of the State of California supersede those laws and regulations?

5. Are those employees who are within the provisions of a collective bargaining contract also members of the State Civil Service System? (R. 56).

A State Belt employee intervened, in effect also contending that pay and working conditions are governed exclusively by legislation or administrative rules and not by collective bargaining contract. The intervener claimed that his benefits and privileges were less under the provisions of the contract than under the State Civil Service Act (R. 50; *State v. Brotherhood*, 37 Cal. 2d 412, 415, 232 P. 2d 857, 859; app. 24).

---

contract (R. 9, 34). In addition to the defense on the merits, California moved to dismiss claim for lack of jurisdiction, on the ground that California, as the owner and operator of the State Belt Railroad, is not subject to the Railway Labor Act.

—*Langston*, Docket 28,223, filed October 23, 1951, by Brotherhood of Railroad Trainmen.

Claim for pay for services for one day at overtime rate, performed as an engine foreman (R. 8, 34), stating said service performed pursuant to the contract. California, as far as the issues here are concerned, alleges Adjustment Board lacks jurisdiction because

(a) California is not subject to the Railway Labor Act;
(b) The contract is invalid;
(c) All matters of employment for personnel of the State Belt are prescribed by the civil service laws of the State and all employees of the State Belt had been employed pursuant to those laws.

The California Supreme Court, in *State of California v. Brotherhood of RR Trainmen* (37 Cal. 2d 412, 232 P. 2d 857) held that

1. Congress did not intend the Railway Labor Act to apply to a state operated carrier.

2. The particular contract was invalid under California law because it had not been approved by the California Department of Finance.

The decision impliedly ". . . sustained the applicability of the State civil service laws and regulations to the State Belt Railroad employees" (Respondent's Brief as Appellant before C.A., 7th, p. 7).

The California court found it unnecessary to take up the other questions.

This Court denied certiorari (342 U.S. 876).

Following denial of certiorari, the carrier members of the First Division of the National Railroad Adjustment Board advised the labor members that, on the basis of the ruling in the California case, the Board had no jurisdiction to hear the claims of State Belt employees, and would not participate in the handling of pending State Belt dockets other than to dismiss them (R. 11-12). Thereupon, on January 14, 1953, the five respondent State Belt employees brought an action in their own names in the District Court for the Northern District of Illinois, Eastern Division, seeking an injunction against the carrier members and Executive Secretary of the First Division to require them to hear and make awards on the claims which had been filed. Jurisdiction of the district court was

asserted on the ground that the Adjustment Board maintains its headquarters in Chicago, Illinois (45 U.S.C., sec. 153, First, (r)), and that the action was one arising out of an act of Congress regulating commerce (28 U.S.C. sec. 1337; (R. 6)).

The complaint set forth the facts of the disputes contained in the various dockets before the Adjustment Board and alleged that respondents had performed their services and had been paid, except as noted, pursuant to the collective agreement (R. 6-9).

The United States, through the United States Attorney General, answered on behalf of the First Division of the National Railroad Adjustment Board and the Executive Secretary thereof, and admitted all of the allegations of the complaint and joined in plaintiff's request for relief (R. 12-13).

The carrier members of the First Division appeared by special counsel. Among other defenses, the carrier members asserted that the jurisdiction of the Adjustment Board was limited to the interpretation and application of valid agreements, and that they lacked jurisdiction of disputes concerning the validity of agreements. With this reference, it was asserted that the California Supreme Court had held that the State Belt Railroad was not subject to the Railway Labor Act and that the particular contract upon which the claims before them were based, was invalid as a matter of law (R. 17-22). The carrier members, upon lack of information or belief, denied that plaintiffs had rendered services to the State Belt and had been paid, pursuant to the collective agreement (R. 18, 19).

California, asserting that it was the real defendant party in interest (R. 24), was permitted to intervene (R. 28-29). California concurred in the defenses raised by the carrier members, and contended that the decision of the California court, rendered with specific reference to the contract upon which respondents' claims were based, was *res judicata*, or, at the least, the ruling that the contract was invalid under California law, was binding upon the district court as a matter of state law. California alleged that rights to pay and conditions of work were all matters established by the civil service laws of California and that no rights were acquired by plaintiffs under the contract (R. 27). The state contended:

1. Aside from the issues of *res judicata* and the state decision, the Adjustment Board lacked jurisdiction to hear and decide respondents' claims because the Railway Labor Act was not applicable to a state;

2. If the act were held applicable, it was an unconstitutional usurpation of the right of a state to control its relationship with its employees.

3. California had not consented to be sued before the Board or in the district court, and that both the claims before the Board and the action were barred by the Eleventh Amendment.

4. The contract was also invalid because the former Harbor Board lacked authority to agree to all-pervading provisions of the contract which were in conflict with the California "State Civil Service Act."

5. Under section 3, second, of the Railway Labor Act and the contract, if valid, the California State

Personnel Board had jurisdiction to decide plaintiffs' claims (R. 26-28).

California (R. 31), the United States (R. 30) and respondents (R. 36) moved for summary judgments. In acting on California's motion, the district court upheld the contention of the carrier members that the Adjustment Board lacked jurisdiction to decide the basic dispute as to (1) the applicability of the Railway Labor Act to the State, (2) the validity of the contract upon which the claims were based, (3) the legal effect of *State v. Brotherhoods* on both of these issues (R. 63, footnote 4). The court then granted California's motion upon the ground that the jurisdiction of the Adjustment Board was limited to the interpretation and application of valid contracts and that "it must give conclusive effect" to the California decision, holding as a matter of state law that the contract was invalid because it had not been approved by the State Department of Finance as required by California law (R. 63). The other issues concerning the jurisdiction of the Adjustment Board—the application of the Railway Labor Act—either as a matter of *res judicata* or a matter of state law—the constitutionality of the collective bargaining or enforcement procedures of the Act as applied to a state, the over-all authority of the Harbor Board to enter into the contract, the authority of the Adjustment Board vis-a-vis that of the State Personnel Board to adjudicate the claims, were left undecided (R. 63 64).

Thereupon, respondents took an appeal to the Seventh Circuit Court of Appeals (R. 74). Included in their state-

ment of the contested issues were—whether railroads engaged in interstate commerce are exempt from compliance with the Railway Labor Act if they are owned by a state, and whether a state acting through legislation and acting through administrative officers could dictate rates of pay, rules and working conditions of employees on a railroad owned by the state in the face of a policy contained in the Railway Labor Act requiring carriers engaged in interstate commerce and the representatives of their employees to bargain collectively (app. Br. in ct. of ap., pp. 8-9).

The carrier members of the Adjustment Board, on the appeal, took the position that the district court had upheld their position that the First Division, of which they were the carrier members, was without jurisdiction to proceed and consider the claims pending before it unless the underlying dispute between the State Belt employees and the State of California as to whether the State Belt Railroad of California was covered by the Railway Labor Act, and whether the agreement relied upon was a valid agreement, was resolved by the court. Taking the position that the court had properly held that these antecedent questions of law were proper questions for decision by the court and not the Board, the carrier members stated that, if the underlying dispute were resolved, they would participate in the consideration and decision of the claims submitted to the First Division (Br. of carrier members before C.A. 7).

In its brief as appellee, California, in support of the summary judgment in its favor, stated as part of its statement of contested issues that it also contended that:

a. The Railroad Adjustment Board lacked jurisdiction to hear and determine respondents' claims because the Railway Labor Act was not applicable to a state's relationship with its employees.

b. If the Railway Labor Act were held applicable to the State of California, then the Act was an unconstitutional interference with a state's relationship to its employees.

c. The contract was invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the state constitution and state civil service laws.

d. If the contract were valid and could be enforced, the authority of the Adjustment Board, to decide the instant claims, was precluded by the terms in the contract that a system board—the State Personnel Board—shall hear and decide claims.

e. In any case, the Adjustment Board should not be required to render awards because such awards could not be enforced against the State of California in the federal courts as the Railway Labor Act provides, because of the prohibition of the Eleventh Amendment to the United States Constitution.

These issues had been set forth by California in its brief before the district court (R. 63), and the brief of the State of California as intervening defendant-appellee (pages 3-5). The brief suggested that if the district court were correct in regarding the California court's decision as decisive—that would end the matter. It would fully dispose of the appeal from the summary judgment. If the

court overruled the district court on this point, then the court of appeals would be confronted with the several important issues which had been presented below, but not passed upon (R. 63-65). Then, the court of appeals, itself, could pass them or remand the case to the district court for further decision.

The Seventh Circuit rejected California's contention that the judgment in the *Brotherhoods* case was *res judicata* with respect to the applicability of the Railway Labor Act on the ground that respondents were not parties to the California action and there was no basis in law or fact for holding that the Brotherhoods, of which respondents were members, were authorized to represent respondents in the state court action. Hence, the California decision did not preclude respondent individual members of the Brotherhoods, as far as their individual claims were concerned, from litigating the question of the application of the Railway Labor Act to their claims and the validity of the contract upon which the claims were based (R. 87-88). Thus "Untrammeled by the doctrine of res judicata" (R. 89), the Seventh Circuit held that "the Railway Labor Act is applicable to the State Belt Railroad in this case" (R. 89-91). By the same reasoning, the circuit court held that a stipulation in the *Brotherhoods* case to the effect, that the collective bargaining contract had not been approved by the California Department of Finance, was not binding upon respondents (R. 91). Thereupon, the circuit court held, in fact, the contract had been either actually or impliedly approved by that department (R. 93-95).

The Seventh Circuit foreclosed consideration of the other issues pertaining to the jurisdiction of the Adjustment Board. These were the constitutionality of the collective bargaining and enforcement procedures of the Act as applied to a state and the authority of the State Personnel Board as a system board.

The court said that California, in its effort to emphasize the legal basis upon which the summary judgment had been granted, had waived these other contentions because they had not briefed them. The judgment of the district court was reversed with costs, and the case was remanded with instructions to enter a decree granting respondents the relief prayed for (R. 97), that is, the issuance of an injunction to the defendant-members of the First Division of the Adjustment Board, and the Executive Secretary of the First Division ordering them to take jurisdiction of the dockets of respondents and to consider, decide them and issue awards thereon in accordance with section 3, First, of the Railway Labor Act (R. 10).

In its petition for rehearing (part of unprinted record), California contended that the Seventh Circuit had incorrectly treated these issues as waived and that California had been deprived of its day in court on them. It asked the circuit court to decide them or remand the case to the district court for decision on the merits (app. pp. 89-94 of pet. for cert.). Rehearing was denied (R. 98). California's petition for certiorari was granted (R. 98).

SUMMARY OF ARGUMENT.

I. No term of the Railway Labor Act refers to a state as the owner and operator of a carrier engaged in interstate commerce. The general terms of a restrictive statute will not be applied to a sovereign state unless there are extraneous and affirmative reasons for believing that Congress intended the statute to apply to a state. This requires an examination of the act in its total environment. All the accepted aids towards this construction, namely, the purpose, subject matter, the evils which the statute was designed to correct, statutes in *pari materia,* the constitutional effects—all conjoin to show that Congress did not intend to impose the collective bargaining and contract enforcing provisions upon a state.

A. The subject matter—the establishment of working conditions through collective bargaining—is universally recognized as being inapplicable to government. The California Supreme Court, when it had the same question before it, declared that for Congress to impose the collective bargaining requirements of the Railway Labor Act upon a state "would constitute an unprecedented interference with a state's traditional method of fixing the working conditions of its employees" by statute, rather than by contract (*State v. Brotherhood of RR Trainmen* (37 Cal. 2d 412, 419, 232 P. 2d 857, 861). This Court has also indicated that it will not interpret the general language of a federal statute, concerning the fixing of wages, hours, and working conditions by collective bargaining, as being applicable to government, and that it would require specific language before it would hold that Congress intended

to embark on such a revolutionary program (*U. S. v. United Mine Workers*, 330 U. S. 258, 274).

B. Congress whenever faced with the question of applying labor relations statutes to government employers in interstate commerce has uniformly excluded the United States or the states and their subdivisions from the provisions of the labor relations acts[7]. This represents a uniform congressional policy that a states' employer-employee relationship is not to be controlled by the federal government even where state employees are engaged in interstate commerce, as are the employees of the State Belt. The Railway Labor Act which has been called the "analogue" of the National Labor Relations Act (now the Labor Management Relations Act of 1947) should be construed to carry out the congressional policy so definitely expressed in these other statutes.

C. The purposes of the act—the removal of the *company* union, by securing full freedom in the choice of collective bargaining representatives, and the prevention of strikes, is also inapplicable to a state (see: *United States v. United Mine Workers*, 330 U. S. 258, 274, concurring op. 328-329).

D. The history of the act gives no indication that state owned carriers were intended to be covered. The act was

---

[7]National Labor Relations Act, § 2(3), 49 Stat. 450 (1935), as amended by Labor Management Relations Act, 1947, § 101, 61 Stat. 137, 29 U.S.C.A. § 152(2) (1956); Labor Management Relations Act, 1947, § 501(3), 61 Stat. 161 (1947), 29 U.S.C.A. § 142(3) (1956); Fair Labor Standards Act of 1938, § 3(d), 52 Stat. 1060 (1938), 29 U.S.C.A. § 203(d) (1947); War Labor Disputes Act, § 2(d), 57 Stat. 164 (1943), expired by its own terms six months after termination of hostilities, § 10, 57 Stat. 168 (1943).

adopted by Congress as the result of an agreement between the railway brotherhoods and private carriers.

E. There are no necessary implications in this act that it must apply to a state carrier in order that it may fulfill a national plan or achieve nationwide uniformity. The act does not call for nationwide collective bargaining or contracts, nor does it fix generally applicable standards of working conditions.

II. The manner in which Congress has employed the federal judicial power at the instance of private parties, as the cornerstone for enforcement of the act's purposes, clearly indicates that Congress, in the light of the prohibition of the Eleventh Amendment, did not intend to apply the act to a state. Money awards made by the National Railway Adjustment Board, such as those sought against California by respondents, are enforceable at the suit of employees in the federal district courts (§ 3 First (p), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (m) (1954); *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 721). The Adjustment Board is made the exclusive forum for the settlement of disputes concerning the interpretation of existing contracts (*Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239). Again, the obligations concerning the free selection of representatives imposed upon carriers by various provisions of section 2, are primarily to be enforced by suits brought in the federal courts by employees and their representatives (44 Stat. 578 (1926), as amended by 48 Stat. 1187-1189 (1934), 45 U.S.C.A. § 152 (1954); *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515). The enforceability of arbitration awards

under sections 7 and 8 of the act in the federal courts has been recognized as an "outstanding feature" of the Railway Labor Act. (§ 9, 44 Stat. 585 (1926), 45 U.S.C.A. § 159; see *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 564-565).

Employment of the federal judicial power under the present Railway Labor Act for the effectuation of the act's purposes, contrasts it from earlier legislation concerning railway labor disputes. Yet, this power and the scheme of its use in the act cannot be employed against a state because of the specific limitations of the Eleventh Amendment. As an application to a state of these basic provisions of the act would be impossible, it must be inferred that Congress did not intend to include a state within the scope of the act.

III. To construe the act as applicable to a state would raise serious constitutional questions concerning the power of Congress to require a state to establish terms of employment through collective bargaining.

A. A distinguishing feature of state government is that public office and employment are established and maintained through the acts of state legislatures which exercise continuing discretionary powers over public employment (*Taylor v. Beckham*, 178 U. S. 548, 571). If the Railway Labor Act applies to a state, the California legislature would have to designate state officers to engage fully in collective bargaining with respect to all matters within the collective bargaining scope of the Railway Labor Act. The legislature thereby would be compelled to surrender the continuing discretion over terms of state employment vested in it by the people of the state. Thereupon, govern-

ment by contract, instead of government by law, would be instituted.

B. It is at least doubtful that the federal government can use the commerce power to deprive the states of their fundamental right to establish terms of public employment by statute unless there are supervening reasons of national necessity that the contract method be used.

C. It is suggested that the Court will not interpret the general language of the act to apply to a state, where to do so, would raise serious constitutional questions concerning congressional power (*N.L.R.B. v. Jones and Laughlin*, 301 U. S. 1, 30).

IV. The cases relied upon by the court below for its holding that the Railway Labor Act applies to a state owned carrier are distinguishable either by the juristic method used or by their factual foundations. *New Orleans Public Belt R. Com'n. v. Ward*, 195 F. 2d (C.A.-5) 829, as did the court below, relied solely upon the broad definition of the term "carrier" in the act. The Seventh and Fifth Circuits failed entirely to consider the purpose, subject matter, and other factors relating to the Railway Labor Act in its total environment. By contrast, *State v. Brotherhoods* (37 Cal. 2d 412, 232 P. 2d 357) after employing these interpretive aids, reached the conclusion that the act was not applicable to a state. *U. S. v. California* (297 U. S. 175) could find "no convincing reason" why the State Belt should not be subject to the federal Safety Appliance Acts in the same way as a private carrier. The great difference between public and private employment in the collective bargaining field was not involved in *California*

v. Anglim, 129 F. 2d (C.A.-9) 455, which merely held that the State Belt was subject to the former Carriers' Taxing Act. (50 Stat. 435; 45 U.S.C.A. §§ 261-273.) A result expected. (*South Carolina v. U. S.,* 199 U. S. 437.)

V. A. The jurisdiction of the National Railroad Adjustment Board is limited to the interpretation of disputes growing out of the interpretation of valid existing agreements. (*Brotherhood of RR Trainmen v. Howard,* 343 U. S. 768, 774.) Whether the contract is valid or invalid, is to be determined by California law (*Moore v. Illinois etc. RR Co.,* 321 U. S. 630, *Trans. Air, etc. v. Koppal,* 345 U. S. 653). Under the California civil service system, rates of pay and all terms of employment are fixed by statute or regulation. The Harbor Board completely lacked authority to negotiate the contract upon which respondents' claims before the Adjustment Board are based. As there is no valid existing contract, the Adjustment Board has no jurisdiction to hear and determine respondents' claims. Therefore, the judgment of the court below is erroneous.

1. California cannot be estopped to deny the validity of a contract which the law did not permit the Harbor Board to make.

ARGUMENT.

I.

THE NATIONAL RAILROAD ADJUSTMENT BOARD LACKS JURISDICTION TO ADJUDICATE RESPONDENTS' CLAIMS BECAUSE THE RAILWAY LABOR ACT UPON WHICH THE AUTHORITY OF THE ADJUSTMENT BOARD IS BASED WAS NEVER INTENDED BY CONGRESS TO CONTROL A STATE'S RELATIONSHIP WITH ITS RAILROAD EMPLOYEES.

The Railway Labor Act (44 Stat. 577 as amended; 45 U.S.C. §§ 151-163[8]) requires all common carriers by railroad, subject to the Interstate Commerce Act, their officers and employees to ". . . exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce. . . ." (48 Stat. 1186; 45 U.S.C. § 152, amending 44 Stat. 572). Employees have the right to organize and bargain collectively through representatives of their own choosing. Procedures are provided for settlement of major and minor disputes by conference of representatives of employer and employees and failing a solution there, by reference to the National Railroad Adjustment Board, the National Mediation Board or arbitration (44 Stat. 577 (1926), as amended; 45 U.S.C. §§ 152-155, 157 (1952)). Union shop provisions, requiring employees to join the representative union of their craft or class and maintain membership therein, may be included in collective bargaining contracts (64 Stat. 1238 § 2, Eleventh; 45

---

[8] 44 Stat. 577 (1926); 48 Stat. 926 (1934); 48 Stat. 1185 (1934); 49 Stat. 1921 (1936); 54 Stat. 785 (1940); 62 Stat. 909 (1948); 62 Stat. 991 (1948); 63 Stat. 107 (1949); 63 Stat. 880 (1949); 63 Stat. 972 (1949); 64 Stat. 1238 (1951).

U.S.C. § 152 Eleventh (a) amending 55 Stat. 577; *Railway Clerks v. Hanson,* 351 U. S. 225).

If the act is applicable to California, it would require the state to bargain with representatives of its State Belt employees for the purpose of establishing rates of pay and working conditions (*Virginia Ry. v. Federation,* 300 U. S. 515, 548). It would impose duties upon California as an employer with respect to the selection of employee representatives and the state would be subject to fine and its officers to imprisonment and fine for violation of the duties imposed (48 Stat. 1186 Tenth; 45 U.S.C. § 152 Tenth, amending 44 Stat. 577).

The National Railroad Adjustment Board was created in 1934 by amendment to the Railway Labor Act. The amendment represented "a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements" (*Slocum v. Delaware L. & W. R. Co.,* 339 U. S. 239, 243).

The awards made by the Adjustment Board are final and binding upon both parties to the dispute except so far as they contain a money award (48 Stat. 1189 (1934), 45 U.S.C. § 153(m), amending 44 Stat. 577). The money awards sought by respondents here could be enforced by suits brought against California in the federal district courts. In such actions, the findings and orders of the Adjustment Board are "prima facie evidence of the facts therein stated."

The act sets forth the procedures which employers must follow in changing rates of pay, rules or working condi-

tions, requiring 30 days' notice and conference with employee representatives. No changes are effective until final action by the National Mediation Board if the Board offers its services or either party requests them (48 Stat. 1197; 45 U.S.C. § 156, amending 44 Stat. 577 (1926)).

If the scheme of this act is applicable to California with respect to those of its harbor employees who are engaged in the work of the State Belt Railroad, it constitutes in the words of the California Supreme Court an "unprecedented interference with a state's traditional method of fixing the working conditions of its employees. . . ." (*State v. Brotherhoods*, 37 Cal. 2d 419, 232 P. 2d 857, 861).

No term of the act refers to a state or a state owned or operated carrier. The act generally covers all carriers and defines a carrier as "carrier by railroad, subject to the Interstate Commerce Act. . . ." (48 Stat. 1185; 45 U.S.C. § 151 First, amending 44 Stat. 577). That act provides it "shall apply to common carriers engaged in . . . the transportation of passengers and property wholly by railroad" (24 Stat. 379, as amended; 49 U.S.C. § 1). The court below in holding that the Railway Labor Act applied to a state carrier argued that the act provided a "functional test only" (*Taylor v. Fee*, 233 Fed. 2d C.A.-7, 251, 255). "Whether the railroad is owned by a private carrier or a State" is not part of the test (R. 90). Furthermore, the term "carrier" is defined "*in such broad terms*"[9] as to include a railroad engaged in interstate commerce and owned by a State" (R. 91). But when it is argued that Congress intended to impose

[9]Emphasis ours unless otherwise indicated.

"unprecedented" control over a state's employer-employee relationship, the words "carrier by railroad" can not be taken "quite so simply" (*United States v. United Mine Workers,* 330 U. S. 258, 309; concurring opinion).

The federal Safety Appliance Act (45 U.S.C. 51) also uses the words "every common carrier by railroad." This could also be described as a functional test rather than one depending upon the identity of the operator. But, when *United States v. California,* 297 U. S. 175, was here, the Court had before it the question of applying that general term to California as the operator of the same State Belt Railroad. It was assumed that the State Belt was subject to the Interstate Commerce Act (297 U. S at pp. 186-187). Rather than summarily applying a "functional test" or relying upon the general term "carrier by railroad," this Court found it necessary to interpret the statute in the light of the old and well-settled rule that statutes, which in general terms, divest pre-existing rights and privileges will not be applied to the sovereign without express words to that effect (citing *Guarantee Title & Trust Co. v. Title Guaranty Surety Co.,* 224 U. S. 152, 155-156; *United States v. Herron,* 20 Wall. 251, 263; *United States v. Stevenson,* 215 U. S. 190, 197); unless there are "extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute . . ." (*United States v. Mine Workers,* 330 U. S. 258, 272-273; *United States v. California,* 297 U. S. 175, 186).

In holding that Congress intended to include state carriers within the operation of the federal Safety Appliance Act, the court first looked at the act's purpose which

was to "protect employees and the public from injury because of defective railway appliances . . . and to safeguard interstate commerce itself from obstruction and injury due to defective appliances," etc. (*United States v. California*, supra, at 185). "The danger to be apprehended," Mr. Justice Stone said, was "as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned" (297 U. S. at 185). The remedy was uniform safety appliances throughout the national railroad system. "No convincing reason" could be advanced why safety appliances should not be required on state-owned carriers as provided by the act which was "all embracing in scope and national in its purpose" (297 U. S. at 185).

Again, when this Court held that the general term "person" would be construed to include California as the public owner of wharves and piers at San Francisco Harbor with respect to the rate making authority of the United States Maritime Commission, under the Shipping Act of 1916, as amended (49 Stat. 1518; 46 U.S.C. 815) the Court stated that the "crucial question" was whether the statute read in the light of the circumstances which gave rise to its enactment and for which it was designed, applied also to public owners of wharves and piers (*California v. United States*, 320 U. S. 577, 585).

A similar interpretive technique was used in *United States v. Mine Workers*, 330 U. S. 258, holding that the general term "employer" in the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101) was not applicable to the government as an employer. This Court said ". . . we cannot construe the general term 'employer' to include the United

States; when there is no express reference to the United States and *no evident affirmative grounds for believing that Congress intended* to withhold an otherwise available remedy from the Government . . ." (330 U. S. at 270). *Parker v. Brown*, 317 U. S. 341, refused to apply the general language "person" in the Sherman Anti-Trust Act to California with respect to the state's control of the interstate marketing of agricultural products under the California Agricultural Prorate Act. Noting that the Sherman Act did not refer to state action, the court said

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (p. 351)

The Seventh Circuit, on the other hand, failed entirely to follow the lead of this Court, as suggested in *United States v. California; California v. United States; United States v. Mine Workers*, and *Parker v. Brown, supra*, with respect to applying the general language of the Railway Labor Act to a state-owned carrier. Particularly should this have been done, when the court had before it an entirely new concept—that Congress would attempt to use the commerce power to regulate a state's employer-employee relationship. It was not enough to say that because other interstate railroad commerce statutes, dealing with other phases of that commerce and imposing different types of control, had been interpreted as applying to the State Belt, that the Railway Labor Act *ipso facto* applied. Each general statute, alleged to include the government, presents its own unique problem of interpretation.

Petitioner submits that a consideration of the purposes, subject matter, history, constitutional aspects, and the terms of the Railway Labor Act in its total environment will clearly demonstrate that Congress never intended the general language of the act to apply to a state-operated carrier.

A. THE SUBJECT MATTER OF THE RAILWAY LABOR ACT—COLLECTIVE BARGAINING TO ESTABLISH THE RATES OF PAY AND WORKING CONDITIONS BY CONTRACT—IS NOT REFERABLE TO A STATE.

The very subject matter—establishing working conditions through collective bargaining, particularly in 1926, when the Railway Labor Act was enacted (*Virginian Ry. Co. v. Federation* (300 U. S. 515, 542)), is foreign to a state. Congress must be given credit for knowing that public agencies traditionally establish the rights and privileges of their employees by statute and regulate them through the legislative process—not through contract. As the California Supreme Court points out (*State v. Brotherhood, etc.*, 37 Cal. 2d 412, 419, 232 P. 2d 857), "Many of the purposes stated in the Railway Labor Act are similar to some of the purposes of the *Norris-La Guardia Act*" (47 Stat. 70, 29 U.S.C. §§ 101-115). In *United States v. United Mine Workers*, 330 U.S. 258, 274, this Court said:

> "The purpose of the [Norris-La Guardia] Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the

designation of such representatives . . . for the purpurpose of collective bargaining . . .'" at p. 274. (cf., Railway Labor Act, (44 Stat. 577, as amended, 45 U.S.C. § 151(a)).

The court concludes "These considerations on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees" (330 U. S. at 274).

In a separate concurring opinion, Mr. Justice Black and Mr. Justice Douglas declared:

> "'Congress never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense.'" (330 U. S. at 328-329).

A forceful statement of the characteristics distinguishing public from private employment appears in a letter from President Franklin D. Roosevelt to the National Federation of Federal employees on August 16, 1937:

> "All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully

or to bind the employer in mutual discussions with Government employee organizations. *The employer is the whole people, who speak by means of laws enacted by their representatives in Congress.* Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters" (Quoted in *City of Springfield v. Clouse,* 206 S. W. 2d (Mo.) 539, 542-543; and *C.I.O. v. City of Dallas,* 198 S. W. 2d (Tex.) 143, 144-145).

The authorities are replete with statements and illustrations of policy demonstrating that the establishment of wages and working conditions by contract is not characteristic of the Federal and state governments. *City of Springfield v. Clouse,* 356 Mo. 1239, 1251, 206 S. W. 2d 539, 545; *Miami Water Works Local No. 654 v. City of Miami,* 157 Fla. 445, 450, 26 So. 2d 194, 195; *Mugford v. Mayor and City Council of Baltimore,* 185 Md. 266, 270-271, 44 A. 2d 745, 746-747; *Hagerman v. City of Dayton,* 147 Ohio 313, 329, 71 N. E. 2d 246, 253, 254; *Railway Mail Assn. v. Murphy,* 180 Misc. 868, 44 N. Y. Supp. 2d 601. These authorities point out that wages and working conditions are fixed by statute—not contract and that public officials are without authority to collectively bargain concerning these matters. This is the law of collective bargaining in California (*State v. Brotherhood of RR Trainmen,* 37 Cal. 2d 412, 417-418, 232 P. 2d 857, 860-861; *City of Los Angeles etc. v. Los Angeles etc. Council,* 94 Cal. App. 2d 36, 43-47, 210 P. 2d 305, 310-313; *Nutter v. City of Santa Monica,* 74 Cal. App. 2d 292, 297-298, 168 P. 2d 741, 745).

As a consequence, statutes which, in general terms, provide for collective bargaining by employers and em-

ployees and the protection of that right, are construed as not applicable to the state and its political subdivisions (*Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 168 P. 2d 741; *Petrucci v. Hogan*, 27 N. Y. S. 2d 718, 723; *Jewish Hospital of Brooklyn v. Doe*, 300 N. Y. Supp. 1111 (and cases cited above)).

As the New York Court of Appeals said in *Railway Assn. v. Corsi*, (56 N. E. 2d (N. Y.) 721 (affirmed 326 U. S. 88)):

> ". . . the terms and conditions of employment of civil service employees of the Post Office and of other departments or agencies of the Federal, State, or City government must be fixed by governmental authority and not by collective bargaining." (p. 723.)

This view, in general, was endorsed here (326 U. S. 88, 95). Consequently, when the question of the application of the Railway Labor Act to the State Belt was before the California Supreme Court, the Court said, referring to the above cases:

> "It is most significant that, while one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules, and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract." (*State v. Brotherhoods*, 37 Cal. 2d 412, 416-417, 232 P. 2d 857, 860.)

B. ALL OTHER FEDERAL LABOR RELATIONS STATUTES EXPRESSLY EXCLUDE THE STATES.

The Railway Labor Act was enacted in 1926 as the first of Congressional Acts imposing upon employers en-

gaged in interstate commerce, the obligation to bargain collectively with representatives of their employees. In this legislative field, it was the forerunner of the National Labor Relations Act of 1935 (49 Stat. 449, as amended, 29 U.S.C. §§ 151, 152 (2) and the Labor Management Relations Act of 1947 (61 Stat. 136, 161; 29 U.S.C. 141, 142(3)). These acts, as does the Railway Labor Act, declare that the failure of employers to collectively bargain and to settle disputes peaceably, leads to strikes and other forms of industrial strife which obstruct or tend to obstruct commerce. This Court has characterized the collective bargaining provisions of the Railway Labor Act as the "analogue" of similar provisions in the National Labor Relations Act (now the Labor Management Relations Act 1947), and has made parallel interpretations of sections of the two acts (*National Labor Relations Board v. Jones and Laughlin etc. Corp.*, 301 U.S. 1).

The Labor Management Relations Act provides (as did the National Labor Relations Act, sec. 2(2), 49 Stat. 450, 29 U.S.C. 152(2)) that

> "The term 'employer' . . . shall not include the United States . . . or any State or political subdivision thereof . . . or any person subject to the Railway Labor Act. . . ." (sec. 2(3), 61 Stat. 161, sec. 2(2) 137, 29 U.S.C. 152(2)).

Because of the exclusion of the states in the federal labor relation acts, California is not required to collectively bargain with representatives of its other employees (some 425 (R. 54)) engaged upon non-railroad work of the San Francisco Harbor although they are also engaged in interstate commerce (*Oxnard Harbor District,*

34 N.L.R.B. 1285 (1941); *Mobile Steamship Assn. etc.*, 8 N.L.R.B. 1297, 1318 (1938)).

The War Labor Disputes Act of 1943 (57 Stat. 163, 50 U.S.C. 1501-11, (expired 6 months after termination of World War II, sec. 10), designed to prevent labor disputes interfering with the war effort, also excluded the federal and the state governments from the definition of "employer".

The Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201-19) designed to prevent sub-standard wages and working conditions for employees in interstate commerce (sec. 2) also excludes the federal government and the states as employers:

> " 'employer' . . . shall not include the United States or any State or political subdivision of a State . . ." (sec. 3, 52 Stat. 1060, as amended, 29 U.S.C. 203(d)).

These statutes bespeak "a uniform congressional policy that the relationship between a state and its employees is not to be controlled by the federal government even where those employees are engaged in interstate commerce." (*State v. Brotherhoods*, 37 Cal. 2d 412, 418, 232 P. 2d 857, 861; *Nutter v City of Santa Monica*, 74 Cal. App. 2d 292, 298, 168 P. 2d 741, 745).

A further indication that Congress, up to the present, does not wish to dictate to the states concerning their relationship with their employees, is found in section 9 of the Universal Military Training and Service Act, which, generally, *requires* that private employers must reemploy former employees when they return from military service (sec. 9(b) (B), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b)

(B)). However, if the employee was "in the employ of any State or political subdivision thereof", Congress, with due regard for the unique position of the states as employers, provided that "it is hereby declared to be the *sense* of the Congress" that a person who has performed military service should be restored to the position he occupied before entering military service (sec. 9(b) (C), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b) (C)). Significantly, Congress, in control of its own personnel matters, makes it obligatory upon agencies of the federal government to reemploy (sec. 9(b) (A), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b) (A)).

1. The Railway Labor Act should be construed to carry out the Congressional policy so definitely expressed in all other statutes concerning labor relations in interstate commerce.

The Railway Labor Act should be construed in consonance with the congressional policy made so clearly evident in the other acts regulating labor matters in interstate commerce (*State v. Brotherhoods*, 37 Cal. 2d 412, 418, 232 P. 2d 857, 861). "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject" (*Tiger v. Western Investment Co.*, 221 U.S. 286, 309).

In *Petrucci v. Hogan*, 27 N.Y.S. 2d 718, and *Jewish Hospital of Brooklyn v. Doe*, 300 N.Y.S. 1111, the provisions of the New York Civil Practice Act restricting the issuance of injunctions in labor disputes were held to be in *pari materia* with the New York State Labor Relations Act (N.Y. Law 1937, ch. 443, N.Y. Labor Law sec. 700 et seq.). Because this latter act excluded the state and its political subdivisions in the same way as the Federal

acts, it was held that the general language of the New York Civil Practice Act was not intended to apply to a state or its political subdivisions (*Jewish Hospital of Brooklyn v. Doe,* supra, pp. 1118-1119).

C. THE PURPOSES OF THE ACT ARE NOT REFERABLE TO STATE EMPLOYMENT.

A prolific source of disputes in the railroad industry "had been the maintenance by the railroads of *company* unions and the denial by railway management of the authority of representatives chosen by their employees" (*Virginian Ry. Co. v. Federation,* 300 U.S. 515, 545, Railway Labor Act, General Purposes, sec. 2, 44 Stat. 577, 45 U.S.C. 151a).

Referring to a similar purpose in the Norris-La Guardia Act to afford full freedom in the choice of representatives for the purpose of collective bargaining, this Court said:

> "These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees" (*United States v. United Mine Workers,* 330 U.S. 258, 274).

In fact, a large number of the states, although necessarily excluding themselves as employers, have provided for collective bargaining with respect to intrastate employment in consonance with the federal labor relations policy (for example: N. Y. Labor Law, McKinney's Consol. Laws, ch. 31, art. 20; California Labor Code sec. 921-923).[10]

---

[10] With respect to the purpose of the act "to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of em-

As pointed out in *Virginian Ry. Co. v. Federation,* 300 U.S. 515, the main purpose of the Railway Labor Act (sec. 2, 44 Stat. 577, as amended, 45 U.S.C. 151(a)) was to prevent strikes and other tactics which would interrupt the free flow of interstate railway commerce by providing procedures for the peaceable settlement of labor disputes (300 U.S. at p. 542).

Up to the present time, at least, strikes by public employees against public agencies to compel them to establish terms of public employment by collective bargaining, have been regarded as illegal and, being for an unlawful purpose, may be enjoined: (See *United States v. United Mine Workers,* 330 U.S. 258, 273-274; *City of Los Angeles v. Los Angeles etc. Council,* 94 Cal. App. 2d 36, 47-49, 210 P. 2d 305, 311-313, and authorities cited; Teller Labor Disputes and Collective Bargaining, 1940 ed., 1947 Cum. Supp. Vol. 1, sec. 171, pp. 113-119).[11] Strikes against the federal government are now specifically made unlawful by statute (sec. 305, 61 Stat. 160, 29 U.S.C. 188) although the right to strike is generally recognized as lawful (61

---

ployees to join a labor organization," (48 Stat. 1186 (1934), 45 U.S.C. 151a(2), amending 44 Stat. 577 (1926)), no question has arisen concerning the right of the State employees engaged upon the work of the State Belt to be members of their respective Brotherhoods nor of the right of the officers of the respective Brotherhoods to present matters involving working conditions generally to the San Francisco Harbor Board or to the State Personnel Board (*State v. Brotherhood of RR Trainmen,* 37 Cal.2d 412, 417, 232 P.2d 857, 861; *Nutter v. City of Santa Monica,* 74 Cal.App.2d 292, 294, 168 P.2d 741, 743; *City of Los Angeles v. Los Angeles etc. Council,* 94 Cal.App.2d 36, 210 P.2d 305).

[11] As President Franklin D. Roosevelt said, in the letter to the National Federation of Federal Employees: "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. . . ."

Stat. 151 (1947), 29 U.S.C. 163 amending 49 Stat. 457 (1935)).

The oppression of labor by refusal of private carriers to improve working conditions was not characteristic of state employment (*Nutter v. City of Santa Monica*, 74 C.A. 2d 292, 297-298, 168 P. 2d 741-744). In fact, the states have been in the forefront of the effort to improve the position of labor and working conditions and have encouraged that improvement by example (Gov. Code secs. 18500, 18850, 18853; *Terminal RR. Assn. v. Brotherhood of RR. Trainmen*, 318 U.S. 1, 7).

D. THE HISTORY OF THE ACT INDICATES THAT ONLY PRIVATE CARRIERS WERE TO BE WITHIN ITS COVERAGE.

State v. Brotherhoods (37 Cal. 2d 412, 419-420, 232 P. 2d 857, 862-863, app. 30-31) thoroughly examined the history of the act and could find no indication that state owned carriers were intended to be covered. In fact, there is the affirmative historical evidence that the Railway Labor Act was accepted and enacted by the President and Congress as an agreement between the railroad brotherhoods and private carriers (67 Cong. Rec., 4504-4505, 4524, 4583, 4652, 8807; *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 753, dissent by Frankfurter, J.).

E. THERE IS NO NECESSARY IMPLICATION THAT A STATE AS A COMMON CARRIER MUST BE SUBJECT TO THE ACT IN ORDER TO CARRY OUT A NATIONAL PLAN OR ACHIEVE NATION-WIDE UNIFORMITY FOR RAILROAD CARRIERS IN INTERSTATE COMMERCE.

Often courts will construe general language to include public agencies where to exclude them would make an exception in a national plan of regulation or would destroy

uniformity. For example, in *United States v. California* 297 U.S. 175, wherein the federal Safety Appliance Act (27 Stat. 531 as amended; 45 U.S.C. §§ 1-46) was found applicable to the State Belt, the Court recognized that, to exclude the State Belt, would impair the uniformity sought by Congress to have uniform safety appliances used throughout the nation's railroad system for the purpose of protecting employees and the traveling public. No reason could be suggested why a state, as a railroad carrier, should not comply with a statute "all embracing in scope and national in purpose" (297 U.S. at 185). But such compulsive implications are not present here. The act does not provide for nation-wide collective bargaining, procedures or contracts. Each carrier may make its own contract or none at all (*Virginian Ry. Co. v. Federation,* 300 U.S. 515, 548). The act "does not fix and does not authorize anyone to fix generally applicable standards for working conditions"; nor has Congress preempted the field of regulating working conditions for interstate railroad commerce (*Terminal RR. Assn. v. Brotherhood of RR. Trainmen,* 318 U.S. 1, 6-7). This lack of a need for uniformity in the Railway Labor Act distinguishes, in part, the other cases relied upon by the Seventh Circuit and by respondents, namely: *Maurice v. California,* 43 Cal. App. 2d 270, 110 P. 2d 706, holding the State Belt subject to the Federal Employers' Liability Act . . . (35 Stat. 65 as amended, 45 U.S.C. §§ 51-60); *California v. Anglim,* 129 F. 2d (C.C.A. 9) 455: finding the State Belt was subject to the federal Carriers' Taxing Act (50 Stat. 435, 45 U.S.C. §§ 261-273). Obviously, when establishing rules of tort liability in the Federal Employers'

Liability Act (35 Stat. 65, as amended, 45 U.S.C. §§ 51-60) Congress intended to provide uniform rules applicable to all employees engaged in interstate commerce, in light of the particular hazards of railroad employment. Toward this end, Congress has so closely allied the Safety Appliance Acts with the Federal Employers' Liability Act that the former acts "cannot be regarded as statutes wholly separate from and independent of the Federal Employers' Liability Act" (*Urie v. Thompson*, 337 U.S. 163, 189).

The imposition of a payroll tax by the former Carriers' Taxing Act of 1937 (50 Stat. 435, for subsequent history of act, see historical note, 45 U.S.C.A. §§ 261-273 (1954)) upon a state as a carrier, and employees of the State Belt, was found to be within the intention of Congress, because of the national interest in retaining trainmen in the national railroad system through the granting of pensions without relation to the particular railroad upon which they might be engaged (*State of California v. Anglim*, 129 F. 2d (C.A.-9) 455, 459, *cert. den.* 317 U.S. 669). In fact, the tax could have been imposed regardless of whether or not the State Belt was engaged in interstate commerce (*Helvering v. Powers*, 293 U.S. 214; *New York v. United States*, 326 U.S. 572).

II.

THE ENFORCEMENT AND ADJUDICATING PROCEDURES OF THE ACT REST UPON THE EXERCISE OF THE JUDICIAL POWER OF THE UNITED STATES AT THE INSTANCE OF PRIVATE PARTIES AND INDICATE THAT APPLICATION OF THE ACT TO A STATE WAS NOT INTENDED.

The obvious handicap which the Eleventh Amendment imposes upon the effective enforcement of the Railway Labor Act against a state affords significant support for the proposition that Congress should not be presumed to have intended the act to apply to a state-owned and operated carrier.

The Eleventh Amendment effectively withdraws from the cognizance of the judicial power of the United States suits in law or equity brought against a state without its consent by any party other than the United States or another state (*Ford Motor Co. v. Department of Treasury of Indiana*, 323 U. S. 459; *Monaco v. Mississippi*, 292 U. S. 313, 329; *Ex parte New York*, 256 U. S. 490; *Duhne v. New Jersey*, 251 U. S. 311, 313; *Smith v. Reeves*, 178 U. S. 436; *Hans v. Louisiana*, 134 U. S. 1).

The language, the legislative history, and the construction placed upon the Railway Labor Act by this Court in numerous decisions clearly demonstrates a congressional reliance upon judicial enforcement by the federal courts at the instance of private parties as a device for effectuating the purposes of the act. To the extent to which Congress contemplated the availability of the federal judicial power as the key to the inadequacies of the Transportation Act of 1920 and to the anticipated efficacy of the Railway Labor Act, it must be assumed that Congress

did not and could not reasonably have supposed an application of the latter statute to a state.

This Court has repeatedly emphasized that the imposition by the Railway Labor Act of legally enforceable obligations upon the parties to railway labor disputes is a salient feature of that act as compared with the earlier federal statutes respecting railway labor relations (see, *e.g., Texas & N. O. R. Co. v. Ry. Clerks,* 281 U. S. 548, 560-567; *Virginian Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 542-549; *General Committee v. M.-K.-T. R. Co.,* 320 U. S. 323, 328-332; *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 720-721, 725-728, *aff'd on reh.,* 327 U. S. 661). Proof of the congressional reliance upon an exercise of the federal judicial power for the instrumentation of the Railway Labor Act may be found in an analysis of a few basic situations.

A. THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES ARISING UNDER EXISTING CONTRACTS RESTS ULTIMATELY UPON AN EXERCISE OF THE FEDERAL JUDICIAL POWER.

The act anticipates the employment of the judicial power of the United States as an integral part of the congressional scheme for the resolution of disputes arising under existing contracts. Disputes between employees and carriers growing out of grievances or disputes arising under existing agreements must first be subjected to private negotiation between the parties. In the event an adjustment of the dispute is not reached by such negotiation, the matter may be referred by petition of either or both of the parties to the appropriate division of the Adjustment Board (§ 3 First (i), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (i) (1954)). The division of the

Adjustment Board affords a hearing to the parties to the dispute and the entire division, sitting if necessary with an impartial referee to break deadlocks, makes a final award (§ 3 First (j), (k) and (l), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (j), (k) and (l) (1954)). The act declares that an award is "final and binding upon both parties to the dispute," except to the extent that it contains a money award (§ 3 First (m), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (m) (1954)). In the event that the award is in favor of the employee, the Adjustment Board division makes an order directing the carrier to make the award effective. The order may include a requirement that the carrier pay money to the employee if he is so entitled under the award (§ 3 First (o), 48 Stat. 1192 (1934), 45 U.S.C.A. § 153 First (o) (1954)).

The award is enforceable by the employee by suit in a United States district court. In such a proceeding the findings and order of the division of the Adjustment Board making the award are prima facie evidence of the facts stated therein. The district courts are empowered to make such orders and enter such judgments, by mandamus or otherwise, as are necessary to enforce or set aside the order of the division of the Adjustment Board. In an enforcement suit in the district court the employee enjoys procedural advantages in addition to the prima facie value accorded to the award itself. He is not liable for costs and if he prevails he may recover his reasonable attorney's fee (§ 3 First (p), 48 Stat. 1192 (1934), 45 U.S.C.A. § 153 First (p)).

Although the procedure provided by the act for the adjustment of disputes arising under existing contracts

may superficially be regarded as occurring in three stages, it should be apparent that Congress contemplated but one integrated process. The provision for enforcement of an award by suit in a federal district court cannot be regarded as a severable proceeding, separate and apart from the other provisions of the act. The conferral by the act of jurisdiction on various divisions of the Adjustment Board to hear disputes arising from existing agreements is exclusive of any other means of obtaining an adjudication of such disputes. Although an employee may pursue a common law remedy in certain instances (*Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 634-636), a carrier may not submit disputes under existing contracts for adjudication in any other forum, state or federal (*Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Conductors v. So. R. Co.*, 339 U. S. 255; *Order of Conductors v. Pitney*, 326 U. S. 561). Moreover, once an award has been rendered by a division of the Adjustment Board, the losing party in the Adjustment Board proceeding appears to be totally unable to gain judicial review except, perhaps, where the award directs the payment of money (see *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 760-761, dissent by Frankfurter, J.). Finally, the prima facie weight accorded to the order by the federal courts, and, indeed, the very fact that the award itself gives rise to a cause of action on the part of an employee, indicates that the Adjustment Board proceeding is an adjudication having substantial legal consequences.

There has been no better analysis of the intertwined relationship between the various stages of the procedure provided by section 3 of the act for the resolution of dis-

putes arising from existing contracts than that of the United States Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 242-243, *aff'd. by an equally divided Court*, 319 U. S. 732. The Court of Appeals analyzed what it termed the "basic, progressive and integral structure of the statute".

If any qualifications in the cited analysis of the Court of Appeals are dictated by the decisions of this Court, they are in the direction of strengthening the emphasis upon the legally significant nature of the obligations created by an award of the Adjustment Board (see, *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 721, 725-728).

We do not deem it necessary for present purposes to identify with precision the point at which the grip of the federal judicial power is first exerted in this process of dispute adjudication. Certainly, the Eleventh Amendment forbids the initiation of an enforcement suit against a state in the federal district court. It might even be asserted that the judicial power takes its bite against the carrier before that stage because of the procedural and substantive advantages accruing to an employee in his enforcement suit by virtue of the Adjustment Board decision. Moreover, in a broader sense, the conferral of exclusive jurisdiction on the board and the consequent deprivation to the carrier of recourse to other forums is in a sense an exercise of judicial power. In any event, an elaborate attempt to identify the exact stage at which the federal judicial power may be first deemed exerted diverts attention from the fundamental point. The effectiveness of the entire statutory process for the adjustment

of minor disputes rests *ultimately* upon an exercise of the judicial power of the United States at the instance of a private party. That power may not be exercised against a state and, it being apparent that in the congressional contemplation the entire process was an integrated one, the conclusion is inescapable that Congress could not have anticipated an application of this plan to a state acting as a carrier.

B. CONGRESS CONTEMPLATED THAT MANY OF THE OBLIGATIONS IMPOSED UPON CARRIERS BY SECTION 2 WOULD BE EFFECTIVE BY ENFORCEMENT IN THE FEDERAL COURTS AT THE INSTANCE OF PRIVATE PARTIES.

As originally enacted in 1926, section 2 Third of the act guaranteed to employees the right to select their bargaining representatives without employer interference or influence (44 Stat. 578 (1926), 45 U.S.C.A. § 152 Third (1954)). The enforceability of this right by judicial process was questioned by the carrier in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548. After reviewing the history of congressional legislation with reference to railway labor disputes and decisions construing Title III of the Transportation Act of 1920 (41 Stat. 469 (1920), repealed by Railway Labor Act, § 14, 44 Stat. 587 (1926), 45 U.S.C.A. § 163 (1954); see, *e.g., Penna. R. R. v. Labor Board*, 261 U. S. 72; *Penna. Federation v. P. R. R. Co.*, 267 U. S. 203), the Court concluded that in the Railway Labor Act, Congress intended to impose certain definite obligations upon the parties to railway labor disputes and that Congress anticipated the enforcement of these obligations by the federal courts (*Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 560-570).

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. (*Texas & N. O. R. Co. v. Ry. Clerks, supra* at 567).

"As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." (*Texas & N. O. R. Co. v. Ry. Clerks*, supra at 569).[10].

The conclusion that Congress contemplated the availability to the parties to disputes of appropriate judicial remedies to secure the rights conferred by the statute has been the foundation of the subsequent treatment of the act in the courts.

The requirement in section 2 Ninth, that a carrier "treat with the representative" certified by the Mediation Board in the event of a dispute as to the identity of the representative was held enforceable by judicial remedy at the instance of the employee representative in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515. As in the *Railway Clerks* case, *supra*, the Court emphasized that an intention to fortify the machinery for voluntary adjustments of labor disputes by calling upon the judicial powers of the federal courts marked the congressional attitude reflected in the Railway Labor Act as

[10]By the addition in 1934 of section 2 Tenth, Congress prescribed criminal penalties for a carrier's failure to comply with the requirements of section 2 Third, Fourth, Fifth, Seventh, and Eighth (48 Stat. 1189 (1934), 45 U.S.C.A. § 152 Tenth).

distinguished from the spirit of Title III of the Transportation Act of 1920.

> "The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Brotherhood of R. & S. S. Clerks Case, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427, supra, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction" (*Virginian Ry. Co. v. System Federation No. 40, supra* at 545).

C. ARBITRATION PURSUANT TO SECTIONS 7 AND 8 OF THE ACT CULMINATES IN AN AWARD ENFORCEABLE BY THE FEDERAL COURTS.

Sections 7 and 8 of the act provide statutory machinery for the arbitration of labor disputes not subject to settlement by conference between the parties or by resort to the Adjustment Board or mediation (44 Stat. 582-585 (1926); 45 U.S.C.A. §§ 157 and 158 (1954)). Though the initial resort to arbitration is a voluntary act by the parties, the arbitration award is declared by section 9 to be conclusive and binding upon the parties as to the merits and facts in the controversy and is enforceable in the federal district court (44 Stat. 585 (1926), 45 U.S.C.A. § 159).

The significance of section 9 is emphasized in the following comparison drawn by this Court in *Texas & N. O.*

R. Co. v. Ry. Clerks, 281 U. S. 548, 564-565, between arbitration under Title III of the Transportation Act of 1920 and under the Railway Labor Act:

> "While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. . . . Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such."

D. CONGRESSIONAL INTENT TO EXCLUDE STATES MUST BE INFERRED.

Did Congress intend that the relationships between a State and those whom it employs in its operation of a railroad be subject to the provisions of the Railway Labor Act? The general language employed in defining the coverage of the act affords no conclusive answer to the question. Moreover, an examination of the legislative history of the act discloses no direct expression on the question. In all probability, if reality be admitted, Congress did not consciously address itself to the problem and the congressional "intention" to which deference is to be given is subjunctive only. What Congress *would* have intended, had it considered the question, may appropriately be deduced either from factors which are known to have been within the congressional contemplation or from factors which it may reasonably be presumed would

have influenced Congress had their relevance become apparent. In a sense, congressional "intention," in its application to specific problems not expressly dealt with by Congress as such, must be derived from the "mood" of Congress (cf. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 487). Such an analytical technique is appropriate in the present case.

Congressional intention with respect to the present problem was not directly manifested in the act. Yet it is clear that Congress, by its enactment of the Railway Labor Act, made two conscious decisions which are of fundamental importance to the solution of the instant problem. First, Congress seized upon the judicial power of the United States as the instrument with which to overcome the deficiencies in its earlier enactments touching upon railway labor disputes and to insure the effectiveness of the act as "an instrument of government" (see *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 751, dissent by Frankfurter, J.). Second, it chose to rely principally upon the initiative of the private parties to railway labor disputes as the stimulus which would call the federal judicial power into action. The act clearly contemplates that the judgments and orders of the federal courts are to be rendered at the instance of and in favor of private parties rather than the United States Government itself.

The third factor which must be considered in any attempt to hypothecate the intent of Congress on the application of the act to a state is the impact of the Eleventh Amendment. The amendment imposes a specific and paramount limitation upon the powers of the federal govern-

ment (cf. *Smith v. Reeves*, 173 U.S. 436, 445-446). It must be presumed that Congress was aware of this fundamental constitutional limitation upon its powers.

The Eleventh Amendment forbids the employment against a State of the very device upon which Congress relied in its attempt to fashion in the Railway Labor Act a more effective instrument of railway government than the voluntary procedures which had been previously employed. That device was the creation of affirmative legal obligations enforceable in the federal courts at the instance of private parties. It is self evident that this is a device which Congress could not have made applicable to a state. Hence it must be presumed that Congress did not intend an application of the Railway Labor Act to a rail carrier owned and operated by a state.

III.

TO CONSTRUE THE RAILWAY LABOR ACT AS APPLYING TO A STATE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

A. A FUNDAMENTAL ATTRIBUTE OF STATE SOVEREIGNTY IS THE RIGHT OF A STATE TO ESTABLISH THE TERMS UPON WHICH ITS EMPLOYEES WILL CARRY OUT STATE FUNCTIONS.

One of the fundamental attributes of state sovereignty is the right to select and control the employees who carry out state functions. A sovereign state carries out its functions and personifies itself through its officers and employees. It has been said that the distinguishing feature of a republican form of government, which the central gov-

ernment is constitutionally bound to guarantee (U. S. Const., Art. IV, sec. 4), is the "right of the people to choose their own officers for governmental administration . . ." (*In re Duncan*, 139 U.S. 449, 461; see *Kotch v. River Port Pilot Com'rs.*, 330 U.S. 552, 557). "It is obviously essential to the independence of the States . . . that their power to prescribe the qualifications of their own officers, the tenure of their offices . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." (*Taylor v. Beckham*, 178 U.S. 548, 570-571; *Snowden v. Hughes*, 321 U.S. 1, 11-13).

One of the proper functions of the states is the power and authority to develop harbors (*Com'r. v. Ten Eyck*, 76 F. 2d (C.A. 2d) 515, 518), and, as Mr. Justice Holmes pointed out in *Sherman v. United States*, 282 U.S. 25, this authority of the state includes the operation of the State Belt—"a State prerogative" p. 29).

The way in which the Railway Labor Act would control and interfere with the right of California as a sovereign state to regulate its relationship with its State Belt employees has already been described.

Essentially, California would be required to negotiate in good faith for the purpose of making a collective agreement concerning rates of pay, rules, and working conditions (sec. 2 First, 44 Stat. 577, as amended, 45 U.S.C.A. § 152, First; *Virginian Ry. Co. v. Federation*, 300 U.S. 515, 548). The present alleged contract is void. There is a complete absence of authority in the Harbor Board to make a contract concerning wages and working conditions for State Belt employees. Hence, assuming that the Railway

Labor Act is applicable to California and supervenes the provisions of the California Constitution (Art. XXIV, app. 74) and the implementing provisions of the California Civil Service Act (Calif. Gov. Code sec. 18500, app. 76), there would have to be a State agent with authority to make a binding contract for the State. Whether or not a contract made under the Railway Labor Act is valid or not, is to be judged by the law of the state where it is made (cf. *Moore v. Illinois etc. RR. Co.*, 312 U.S. 630, 633-634; *Transcontinental Air v. Koppal*, 345 U.S. 653). Consequently, the legislature would have to enact a statute authorizing an officer or officers—no doubt the San Francisco Harbor Board—to negotiate a contract.

Under present concepts of state government:

> "public office or employment never has been and cannot become a matter of bargaining and contract. . . . This is true because the whole matter of qualification, tenure, compensation, and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who represent the legislative body. . . . Thus, qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract." (*City of Springfield v. Clouse*, 356 Mo. 1239, 1251, 206 S.W. 2d 539, 545).

Thus, the people of California, as the repositors of state sovereignty and, acting through their legislature, would be forced under federal mandate to give up legislative

control over State Belt employees. The California Legislature would have to surrender its "continuing discretionary powers" (*City of Los Angeles v. Los Angeles etc. Council,* 94 Cal. App. 2d 36, 47, 210 P. 2d 305, 311) over terms of State employment vested in it by the people of the state (*Butler v. Pennsylvania,* 10 How. (51 U.S.) 402, 416). It is recognized that the act only requires the employer to "treat with" the bargaining representatives of employees. But to conform to the good faith bargaining requirements of the Railway Labor Act, the Legislature would have to surrender its legislative control over terms of employment for state employees and designate state officers to engage fully in collective bargaining with respect to all matters within the collective bargaining scope of the Railway Labor Act (*Brotherhood etc. v. Atlantic Coastline R. Co.,* 201 F. 2d (C.A.-4), 36, 39). ". . . government by contract instead of government by law" would then be instituted (*City of Los Angeles v. Los Angeles etc. Council,* 94 Cal. App. 2d at 46, 210 P. 2d at 311)

Furthermore, this concept that the terms of public office or employment and the compensation to be received can or should be stratified in a contract, runs counter to the decisions of this Court holding that the nature of the relation of public office or employment to the public "is inconsistent with either a property or a contract right" (*Taylor v. Beckham,* 178 U.S. 548, 577; *Butler v. Pennsylvania,* 10 How. (51 U.S.) 402, 416; Willoughby, The Constitution of the United States, Vol. 1, second ed. 1929, sec. 127, p. 227).

With respect to the enforcement features of the act, State Belt employees could carry California before the

National Railway Adjustment Board in Chicago, Illinois, as is sought to be done here, for the settlement of disputes over interpretations of the contract negotiated (cf. *Oklahoma v. U. S. Civ. Serv. Com.*, 153 F.2d (C.A.-10) 280, 282, *aff'd* 330 U.S. 127). These coercions and controls with respect to a state's employer-employee relationship (cf. *Johnson v. Maryland*, 254 U.S. 51, 57) would appear to be an interference with "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies", a right "conceded by the uniform decisions of this court and by the practice of the Federal government from its organization." (*United States v. Railroad Co.*, 84 U. S. 322, 327; *In re Means*, 14 Cal.2d 254, 258, 93 P.2d 105, 107; *Attorney General v. Pelletier*, 134 N.E. (Mass.), 407, 415.)

Oklahoma v. U. S. Civil Service, 153 F.2d (C.A.-10) 280, 282, *aff'd* 330 U.S. 127, 143, referring to the application of the Hatch Political Activity Act to the states, declared:

> "It is the prerogative of a state to create and maintain offices of government according to its own choice, *free from interference by the United States*. But this Act does not invade the rights of the states in the untrammeled exertion of that attribute of sovereignty. . . ."

B. THE INCIDENTAL IMPORTANCE OF COLLECTIVE BARGAINING BY STATE EMPLOYEES ENGAGED IN INTERSTATE RAILROAD COMMERCE, CANNOT JUSTIFY FEDERAL INTERFERENCE WITH THE SOVEREIGN RIGHT OF A STATE TO CONTROL ITS EMPLOYEE-RELATIONSHIP.

The important constitutional question presented is whether Congress under the commerce power may control

a state's relations with its employees engaged in interstate commerce, as against a state's acknowledged right as a sovereign to provide, generally, by its own laws, the terms of employment. This presents to the Court the task of balancing and accommodating constitutional powers—the power of Congress to regulate labor relations in interstate commerce (*Virginian Ry. v. System Federation*, 300 U. S. 515, 545; *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 233) and the power of the sovereign states to control through state laws their relationship with their employees (*In re Duncan*, 139 U. S. 449, 461; *Taylor v. Beekham*, 178 U. S. 548, 571)—"a duty oftentimes of great delicacy and difficulty" (*South Carolina v. U. S.*, 199 U. S. 437, 448).

1. The federal government under its commerce power cannot control the state's employer-employee relationship, unless there are supervening reasons for justifying such control.

While this Court has said in *U. S. v. California,* 297 U. S. 175 that "California by, engaging in interstate commerce by rail, has subjected itself to the commerce power" (p. 185) and that the "sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution" (p. 184), nevertheless "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument. . . ." (*Monongahela Nav. Co. v. U. S.,* 148 U. S. 312, 336).

Because a state function is part of interstate commerce, does Congress have absolute authority over everything related to that function, irrespective of the inherent rights of state governments? ("The 'Current of Commerce' "—Selected Essays on Const. Law, Vol. 3, pp. 184, 190-191).

The National War Labor Board was given jurisdiction over "labor disputes" which might interrupt work contributing to the effective prosecution of the war (Ex. Order 917, 50 U.S.C. App. 1507). Certainly, the power to wage war (Art. I, sec. 8, cl. 2) is as plenary as the commerce power. Yet, the Board held that it had no jurisdiction over a labor dispute between the transportation workers of the City of New York and that city's Board of Transportation and between the municipal employees of the City of Newark and the city government of Newark, the latter's transportation facilities being part

of interstate commerce. In an unanimous decision (*Municipal Government, City of Newark, etc.*, 5 War Labor Rept. 286 (1942)) by Dean Wayne Morse (now Senator Morse), the Board held that

> "The National War Labor Board is unanimously of the opinion that as a matter of law, it does not have jurisdiction over labor disputes between state governments, . . . and their public employees. The well-established doctrines in American law pertaining to the sovereign rights of state and local governments clearly exclude such disputes from the jurisdiction and powers of the Board. . . ." (p. 296).
>
> "It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment those who are engaged in performing services for the states or their political subdivisions. . . ." (p. 288).

And, with particular reference to the adjudicatory authority of the Railroad Adjustment Board it should be noted that the National War Labor Board said:

> "Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of the local state government" (p. 288).

Some overriding necessity would have to exist to authorize federal control over a state's relationship with those of its employees engaged in interstate commerce, in the light of a state's countervailing right, and, in fact,

necessity, to fix the terms of employment by law, rather than contract (*Oklahoma v. U. S. Civil Service Com'n.*, 153 F.2d 280, *aff'd* 330 U. S. 127).

2. The fact that the State Belt has been characterized as a proprietary function of the State provides no different basis for applying the Railway Labor Act to California.

The right of a state to control its relationship with its employees by statute rather than by contract does not turn upon a distinction between proprietary and governmental functions (cf. *New York v. United States*, 326 U.S. 572). The operation of the State Belt has been described as proprietary from the standpoint of disallowing the State's claim of immunity from tort liability (*People v. Superior Court*, 29 Cal.2d 754, 762, 178 P.2d 1). But the imposition of tort liability in connection with proprietary functions provides no valid distinction with respect to the constitutional feasibility of having state officers establish terms of employment by contract rather than statute. "We can find no legitimate reason for making any distinction in the present case between governmental and proprietary functions of the state" (*State v. Brotherhoods*, 37 Cal.2d 412, 421, 232 P.2d 857, 863. The distinction was rejected in *Nutter v. City of Santa Monica*, 74 Cal. App.2d 292, 302, 168 P.2d 741, 748 (involving city bus lines) and in *City of Los Angeles v. Los Angeles, etc. Council*, 94 Cal.App.2d 26, 45-46, 210 P.2d 305, 311 (Dept. of Water & Power).

In prescribing terms of employment, the state is acting in its governmental capacity regardless of the particular way in which the employee serves the state. The distinc-

tion has been found unworkable in public employment—"A single civil service system governs all classified positions in the City's service, regardless of whether they involve an exercise of governmental or proprietary functions (*City of Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 26, 46, 210 P.2d 305, 311; Teller, Labor Disputes and Collective Bargaining, 1947 Supp., sec. 171, p. 117).

As already noted, any money awards rendered by the Adjustment Board in the disputes involved in this case, could not be enforced by the individual respondents through suits in the federal district courts as contemplated by the Railway Labor Act (sec. 3 First (p)) because of the prohibition of the Eleventh Amendment. That constitutional restriction remains, even though California in its operation of the State Belt is regarded as engaged in a proprietary function (*Murray v. Wilson Distilling Co.*, 213 U.S. 151).

C. THE COURT SHOULD ADOPT AN INTERPRETATION OF THE RAILWAY LABOR ACT WHICH WILL AVOID RAISING SERIOUS CONSTITUTIONAL QUESTIONS.

To hold the Railway Labor Act applicable to a state raises two serious questions of constitutional power: (1) The power of Congress to require a state to establish by contract the terms of employment for state employees engaged in interstate commerce, despite a state's inherent right to maintain a continuing legislative control over such employment; (2) The use of the federal judicial power at the behest of private parties in the act's enforcement and adjudicating procedures, in face of the prohibition of the Eleventh Amendment.

This Court has "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid," its "plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same", (*N.L.R.B. v. Jones and Laughlin*, 301 U. S. 1, 30).

It is difficult to predict what this Court would say on the constitutional issues if it first held that Congress intended to impose the Railway Labor Act on state employment. But at least there is serious doubt about the matter, and "to avoid a serious doubt", it would seem that the court should hold that Congress in the Railway Labor Act did not intend to undertake the unprecedented step of regulating the employer-employee relationships of the states.

IV.

THE AUTHORITIES RELIED UPON BY THE SEVENTH AND FIFTH CIRCUITS ARE EASILY DISTINGUISHABLE.

Petitioner here, as did the California Supreme Court in *State v. Brotherhoods*, supra, has considered the subject matter, statutes in *pari materia*, the act's history, the mischiefs to be corrected, the inapplicability of the enforcement scheme, and the avoidance of constitutional questions to present the act to the Court in its total environment. On the other hand, as pointed out (supra), the court below failed entirely to use these accepted interpretative aids for the construction of the general language of the act. In fact, it made a virtue of necessity by relying on the general language to solve the problem of construing the general language.

The court below (R. 91) as did the Fifth Circuit in *New Orleans Public Belt R. Com. v. Ward* (195 F.2d (C.A. 5) 829, 831) bases its decision upon the broad definition of the term "carrier" in the act. However, the act merely defines "carrier" as a "carrier by railroad, subject to the Interstate Commerce Act". It is to be noted that the Fifth Circuit gave only cursory consideration to the question of congressional intent to apply the act to a public carrier and then only when notice was received that this Court had denied certiorari. The parties did not consider the issue in the district court.

The Seventh and Fifth Circuits failed to follow the example so frequently set by this Court in dealing with general statutes which would limit the exercise of the reserve powers of the states (*United States v. United Mine*

Workers, 330 U.S. 258, 270-276; *United States v. Wittek,* 337 U. S. 346, 358-359).

City of New Orleans v. Texas & Pac. Ry. Co. (195 F.2d (C.A. 5) 887), merely indicates that publicly owned carriers engaged in interstate commerce are subject to the jurisdiction of the Interstate Commerce Commission (see *United States v. California,* 297 U. S. 175).

We have already shown that there are affirmative reasons for holding the federal Safety Appliance Act, 45 U.S.C., ch. 1, and the federal Employers Liability Act, 45 U.S.C., ch. 2, applicable to a state carrier. *California v. Anglim* (129 F.2d (C.A. 9) 455; (R. 91)) differs in two respects. It involved a tax on a non-essential state function (*New York v. United States,* 326 U.S. 572; see *Helvering v. Powers,* 293 U. S. 214; *South Carolina v. United States,* 199 U. S. 437). Actually the court had only the tax question before it. Secondly, if the purpose of the tax can be considered in determining the validity of its imposition upon a state, which is doubtful, *Anglim* refers to the congressional intent to attract men to the national railroading organization and to encourage them to remain by providing pensions based upon service to "an all embracing entity", i.e., *national railroading* as distinguished from individual employer carriers (129 F.2d at 459). It may be argued that the creation of a retirement plan under which the State Belt employees will receive pensions is an interference with or control over part of California's employer-employee relationship which has received the approval of a circuit court. In the first place, the retirement plan is "wholly divorced" from the tax imposed upon the State.

> "The railroads and their employees pay wage-taxes —but these tax payments are wholly divorced from the pension fund. . . . the amount of the railroad employees' withholding payments—the wage-taxes—has no relation to the pension amounts the United States Government will pay to the railroad employees or their dependents" (*Estate of Tarrant,* 38 Cal.2d 42, 50, 237 P.2d 505, 509; citing *State of California v. Anglim,* supra).

The Railroad Retirement Act (49 Stat. 967, as amended, 45 U.S.C. 228a) does not require the men to retire. The state, if it wished, could have its own retirement plan. While superficially there may be a semblance of the type of control contemplated here, actually no duties or controls are imposed as in the case of the Railway Labor Act.

Petitioner does not believe that the requirement of uniform safety appliances on a railroad car is of the same character and nature as the alleged requirement that the state operator of the car must establish working conditions for its employees by contract rather than by statute. Nor is the imposition of a rule of liability for injuries suffered through a failure to maintain a safety appliance, the same thing as federal policing of the sovereign state's relationship with its employees. A payroll tax, based upon the wages a carrier pays to its employees, does not differ greatly from income taxes imposed upon a state operated liquor business (*South Carolina v. United States,* 199 U.S. 437) or a state operated transit system. (See *Helvering v. Powers,* 293 U.S. 214.)

Each new assertion of the federal commerce power which further reduces the sovereign authority of the states,

deserves careful consideration of the particular control being imposed. As one judge of this Court has said, "In this manner, case by case adjudication gives to the judicial process, the impact of actuality and saves it from the hazards of generalization."

In the Railway Labor Act, Congress would be depriving the states of their inherent right as constitutent parts of the federal plan to maintain a continuing legislative control over the terms upon which its officers and employees carry out state functions, and would require the employer —the people of the state—to stratify those terms in a contract. "An unexpressed purpose" to so "nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (*Parker v. Brown*, 317 U.S. 341, 351).

V.

THE ADJUSTMENT BOARD LACKS JURISDICTION OVER RESPONDENTS' CLAIMS AS THE HARBOR BOARD HAD NO AUTHORITY TO MAKE THE CONTRACT UPON WHICH THE CLAIMS ARE BASED.

Should the Court hold the act applicable to a state owned carrier, the question remains: Is there a valid contract to be interpreted and applied by the Adjustment Board? If not, the Board is without jurisdiction.

The Adjustment Board exists for the adjustment of disputes "growing out of the interpretation of existing agreements". "The Board has no other functions, . . .". (The National Railroad Adjustment Board: A Unique Ad-

ministration Agency, 46 Yale L.R. 567; *Slocum v. Delaware etc. RR. Co.*, 339 U.S. 239, 242-243). Respondents' claims are based upon the contract of September 1, 1942 (R. 6-9, 100-116). Petitioner asserts here (R. 27) and has asserted in its submissions to the Adjustment Board that the Board lacks jurisdiction to hear and decide the claims because the collective agreement is invalid, in that the Harbor Board lacked authority to execute it (Brewster—Docket 25.034, Mang. Sub. p. 11, R. 99). However, "The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board. . . . This dispute involves the validity of the contract, not its meaning. . . :" (*Brotherhood of RR. Trainmen v. Howard*, 343 U.S. 768, 774). Before the Board can be ordered to hear and decide respondents' claims, the Court must find that there is a valid contract. And whether or not a collective agreement is valid or invalid is to be judged by the law of the state where the contract was made. As this Court said in *Colgate etc. Co. v. National Labor Relations Board*, 338 U.S. 355 "We therefore also look to the law of the state where the closed-shop contract was made, here, California, to determine its validity" (p. 361). The same rule applies with respect to contracts negotiated pursuant to the Railway Labor Act (*Moore v. Illinois etc. RR. Co.*, 312 U.S. 630, 633-634; *Transcontinental Air v. Koppal*, 345 U.S. 653, 656-657). Consequently, the rules by which a state is bound by a contract negotiated by state officers will apply here.

The authority of the Harbor Board with respect to the employment and terms of employment of the State Belt

employees was limited to appointing them "subject to civil service laws" (Calif. H. & N. Code secs. 1732, 1732.7; app. 81). Otherwise, the State Civil Service Act (Calif. Gov. Code secs. 18000-19765) and the rules and regulations of the State Personnel Board provide a comprehensive system under which the State Personnel Board supervises all phases of rates of pay, status of employees and working conditions for all State employees within the State Civil Service System (*State Comp. Ins. Fund v. Riley,* 9 Cal. 2d 126, 134, 69 P. 2d 985, 988-989). The authority granted the Harbor Board over persons employed at the Harbor and on the State Belt prescribes the limit of its powers. Where a power is conferred by statute and the mode of its exercise is also prescribed, the mode is the measure of power (*Cowell v. Martin,* 43 Cal. 605, 614).

The authorities make it abundantly clear that, under California law, particularly where there is a civil service system, the Harbor Commission lacked authority to make the collective agreement (*Nutter v. City of Santa Monica* (74 Cal. App. 2d 292, 298, 168 P. 2d 741, 745); *City of Los Angeles v. L. A. etc. Council* (94 Cal. App. 2d 36, 44-47, 210 P. 2d 305, 310-312); *Mugford v. Maryland City Council* (44 Atl. 2d (Md.) 745). *State v. Brotherhood of RR. Trainmen* (37 Cal. 2d 412, 232 P. 2d 857) clearly indicates that the Harbor Board did not have the authority to negotiate the present contract in derogation of the State's civil service laws (37 Cal. 2d 412, 417-419, 232 P. 2d 857). The agreement creates conflicts in a number of particulars, some allegedly being the basis of the disputes in the submissions before the Board (i.e., Brewster Docket, supra; appendix 84-85).

"The statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith" (*Boren v. State Personnel Bd.*, 37 Cal.2d 634, 641, 234 P.2d 981, 985). The Brotherhoods as the collective bargaining agents of respondents must be presumed to have known that ". . . state employment is accepted subject to statutory provisions regulating such matters as salary, working conditions and tenure" (*Boren v. State Personnel Bd.*, supra, at 639, citing *State v. Brotherhood of Railroad Trainmen,* supra).

The circuit court elected to hold that the State Department of Finance had impliedly approved the contract either at the time of its execution or by auditing the payroll for employees covered by the contract under its supervisory authority (R. 95). Assuming this to be the fact (actually it was contested infra, 71), rates of pay for civil service employees and terms of employment are fixed by the State Personnel Board (Gov. Code secs. 18703, 18705, 18850, and 18853). The acts of the Department could not give validity to rates of pay and terms of employment in conflict with State civil service. Hence, even if the Act applies to California, the contract before the Court still must be judged by the usual concepts of contract law. The Harbor Board, as the agent of the State charged with the general administration of the State Belt (Calif. H. & N. Code sec. 1732.7, app. 81-82) simply lacked the authority to bind its principal, the State of California.

However, it may well be that California through its legislature would be required to enact legislation authorizing some State agency, such as the State Personnel Board or the Harbor Board, to collectively bargain with representatives of its State Belt employees and thus enable the State agency to properly and authoritatively enter into a collective bargaining contract.[11] But, until that is done, no contract exists upon which the jurisdiction of the Adjustment Board can be based. Therefore, the lower court was in error in ordering the Adjustment Board to proceed to hear and determine claims based upon a contract which was invalid.

A. THE STATE CANNOT BE ESTOPPED BY THE ALLEGED ACTION OF ITS OFFICERS PURPORTING TO ACT UNDER THE CONTRACT.

The opinion of the circuit court suggests that California is now estopped to claim that the contract is void because respondents "rendered service to the Harbor Board and received their pay under the agreement" (R. 93, 96). Allied to this is a statement that "it would be an inequity for a court at this time to declare" the contract void to the detriment of the seniority rights "based upon service rendered by them under said contract" (R. 96). It is definitely established by the California decisions, and by the federal authorities as well that ". . . the

---

[11]This authorization would be granted on the ground that the Railway Labor Act under the supremacy clause (U. S. Const. Art. VI, cl. 2; Calif. Const. Art. I, sec. 3) automatically superseded the provisions of the California Constitution (Art. XXIV) establishing State Civil Service, and a constitutional amendment would not be required.

authority of a public officer cannot be expanded by estoppel" (*Boren v. State Personnel Board*, 37 Cal.2d 634, 643, 234 P.2d 981, 986; *Utah Power etc. Co. v. U. S.*, 243 U.S. 389, 409). Even receipt of performance under a contract will not establish estoppel (*Pine River Logging Co. v. U. S.*, 186 U.S. 279, 291).

Furthermore, if life is to be breathed into the contract through the doctrine of estoppel to provide a judicial basis for adjudicatory action by the Adjustment Board, it should be noted that the contemplated order of the circuit court is only grounded upon the record made in connection with the motions for summary judgment (R. 73). There are no admitted facts in the pleadings to support the circuit court's statement that respondents received their pay and rendered services pursuant to the contract—which is the basis for the suggested estoppel. On the contrary, the contract (R. 100) sets forth rates of pay effective September 1, 1942. There is no indication that these rates have ever been changed since that date by collective bargaining (R. 116). We believe that the Court can surmise that, since that date, there have been many changes in rates of pay established under civil service procedures by the California State Personnel Board. Hourly rates of pay are fixed by the State Personnel Board (Calif. Gov. Code sec. 18500) after taking into account the prevailing rates of wages in the particular locality (San Francisco) (Calif. Gov. Code sec. 18853). Obviously, the compensation so fixed by the State Personnel Board is based upon the premise that the service is to be rendered pursuant to con-

ditions of work as established by the civil service statutes and regulations (*Boren v. State Personnel Board*, 37 Cal. 2d 634, 639, 234 P.2d 981, 982). Similarly, seniority rights obtained through the performance of such service under these conditions would be determined by such statutes and regulations.

1. Whether or not respondents' services were rendered pursuant to the collective contract is a contested issue of fact.

Whether or not respondents' services were rendered under a contract or pursuant to State civil service laws was a contested issue of fact. Respondents alleged in their complaint that the services were rendered pursuant to the contract (R. 6-9). The carrier members denied the allegation for lack of information and belief (R. 18, 19), which constituted a denial (F.R.C.P. 8(b)). California, in its answer, alleged that respondents' employment rights were all measured by the civil service laws of the State and no rights with respect to any of the matters referred to in the complaint were acquired by plaintiffs under the collective bargaining agreement (R. 27). Therefore, should the Court reach the question of whether the contract can be treated as valid on the basis of estoppel, the case should be remanded for a trial on the issue (*Fountain v. Filson*, 336 U.S. 681; *Standard-Vacuum Oil Co. v. U. S.*, 339 U.S. 157, 160-161).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
HERBERT E. WENIG,
Assistant Attorney General of the State of California,
RICHARD S. L. RODDIS,
Deputy Attorney General of the State of California,
EDWARD M. WHITE,
Counsel for Petitioner.

February 9, 1957.